***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

75-2105

*To be argued by*
FREDERICK J. LUDWIG

# United States Court of Appeals

**For the Second Circuit**

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Docket No. 75-2105

In the Matter of the Application
of
DEIDRE SMITH,
Petitioner-Appellant,
for a Writ of Habeas Corpus
- against -
JANICE P. WARNE, Superintentendant,
Bedford Hills Correctional Facility of the State of New York,
Respondent-Appellee.

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## REPLY BRIEF FOR APPELLANT

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# I N D E X



## TABLE OF AUTHORITIES

Cases:

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## REPLY BRIEF FOR APPELLANT

Two answers have been made to appellant's claims: (I) Without denying appellant's seizure at the elevator by Officer Drexel, his forcible removal of her to another apartment and his interrogation of her there behind a closed door, and without asserting that there was any probable cause that she committed any crime, the appellee insists that subsequent consent to search purged this primary taint: "Once the factual issue of consent is established, petitioner's claims as to illegal search and seizure, and 'fruit of the poisonous tree' are irrelevant." (Appellee's brief, p. 11); and (II) The presumption of correctness of the State court survives a suppression hearing from which the testimony of Officer Drexel was withheld by the

prosecution, and that Court declined to reconsider the question of suppression after uncontradicted, first-hand testimony of the unlawful seizure of appellant's person was first produced during trial (Appellee's brief, p.10).

I

In Brown v. Illinois, ___U.S. ___, 95 S.Ct. 2254 [decided June 26, 1975], the Court reversed a conviction of murder based upon two separate confessions made after Miranda warnings on both occasions, but also made after defendant's person had been seized for investigation upon suspicion that did not amount to probable cause. The decision was based upon the Fourth Amendment's prohibition of "persons * * * seized" without warrant, and the consequences of such seizure under the doctrine of "fruit of the poisonous tree." The primary taint of such seizure is not automatically overcome by giving prescribed warnings not claimed to have been misunderstood. The decision that the conviction could not stand was unanimous, with two Justices preferring remand for reconsideration by the State court instead of reversal. The Court cited and relied upon the identical authority for the doctrine of "fruit of the poisonous tree" [id., 95 S.Ct. at 2260] also cited and relied upon by this Court in United States v. Edmons, 432 F.2d 577 at 584 (1970) [Appellant's brief, p.43], as well as those authorities [Brown v. Illinois, supra, at 2261 ftn.7] set forth by this Court in its landmark decision upon the consequences of unlawful seizure and detention of the person. United States v. Toscanino, 500 F.2d 267 at 272-273 (en banc 1974).

II

The presumption of correctness of the determination of the State court, after a suppression hearing from which the testimony of Officer Drexel concerning the unlawful seizure of the person of appellant was knowingly withheld by the prosecution, and his identity both was unknown to appellant and could not be ascertained by her by any discovery device, cf., Brady v. Maryland, 373 U.S. 83 (1963); United States v. Keogh, 391 F.2d 138 (2d Cir. 1968), is stretched to the vanishing point and disappears entirely when the identical State Judge conducting the hearing declined to reconsider the question of suppression when the evidence of seizure was first produced during trial (Appellant's brief, p. 54-57).

C O N C L U S I O N

The judgment of the District Court below dismissing the application for a Writ of Habeas Corpus should be reversed in all respects.

Respectfully submitted,

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